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Angela Macdonald

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WHY MARIJUANA IS NOT REGULATED LIKE ALCOHOL IN COLORADO: A WARNING FOR STATES SEEKING TO LEGALIZE RECREATIONAL MARIJUANA

Angela Macdonald

Colorado is unique in a number of ways. Colorado hosts some of the best skiing and snowboarding in the world,¹ was one of the first states in the nation to operationally legalize marijuana for recreational use,² and Colorado has particular tax restrictions unlike any other state.³ While competing with world-class skiing may not be an option for all states, any state contemplating legalizing recreational marijuana in a similar manner to Colorado may want to consider what sets Colorado apart; how legalized recreational marijuana works for Colorado; and ways to address tax and regulation issues in new marijuana legalization efforts.

INTRODUCTION

In 2012, Colorado voters legalized marijuana for recreational use.⁴ The ballot measure was promoted as a way to “regulate marijuana like alcohol.”⁵ Amendment 64 presented a number of ways it would regulate marijuana like alcohol, which include:

- Minimum age requirement of 21 years for sale
- Proof of age requirement for sale
- Driving under the influence of marijuana is still a crime

¹ *About Crested Butte*, COLORADO HIGH COUNTRY CHALETs (Feb. 12, 2015), <http://www.coloradohighcountrychalets.com/about-crested-butte/>; *Aspen Mountain, UNCOVER COLORADO* (Feb. 12, 2015), <http://www.uncovercolorado.com/skiing-snowboarding/aspen-mountain/>; Aaron Teasdale, *World's 25 Best Ski Towns*, NATIONAL GEOGRAPHIC (Feb. 12, 2015), <http://adventure.nationalgeographic.com/adventure/trips/best-ski-towns-photos/>.

² John Ingold, *World's first legal recreational marijuana sales begin in Colorado*, THE DENVER POST, Jan 01, 2014, http://www.denverpost.com/news/ci_24828236/worlds-first-legal-recreational-marijuana-sales-begin-colorado.

³ COLO. CONST. art. X, §20, http://tornado.state.co.us/gov_dir/leg_dir/olls/constitution.htm#ARTICLE_X_Section_20; *Colorado's TABOR*, THE BELL POLICY CENTER (Feb. 12, 2015), <https://bellpolicy.org/node/1196>.

⁴ Patrick Malone, *Colorado marijuana legal after governor signs declaration of Amendment 64*, COLORADOAN (Feb 12, 2015), <http://archive.coloradoan.com/article/20121210/NEWS01/312100022/Colorado-marijuana-legal-after-governor-signs-declaration-Amendment-64>

⁵ Campaign to Regulate Marijuana like Alcohol, MARIJUANA POLICY PROJECT (Feb. 10, 2015) <http://www.regulatemarijuana.org>.

- Allowing legitimate business people to participate in marijuana industry
- Proper labeling requirements⁶

Section 16(1)(a) of the amendment states that in the interest of efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, marijuana shall be “taxed in a manner similar to alcohol.”⁷ But what does regulating marijuana like alcohol really mean? After enacting regulations, is marijuana in Colorado really regulated like alcohol? What considerations should other states make before legalizing and enacting regulations for recreational marijuana to avoid or lessen the potential of overspending and corruption in such a lucrative industry?

This paper will examine the background of recreational marijuana legalization in Colorado and the state’s subsequent regulations; issues changing the direction of the state’s initial attempt to over-tax recreational marijuana; and recommendations for other states seeking to legalize recreational marijuana. Since legalizing marijuana, Colorado has passed a number of legislative acts to regulate the industry, and while this paper touches on the smaller pieces, the primary focus is House Bills 13-1317 and 13-1318.⁸ HB13-1317 lays the foundation of regulations for the commercial recreational marijuana industry, and HB13-1318 establishes the tax scheme applied to marijuana sales, wholesale and retail.⁹

The regulations and tax scheme created in these two bills will then be compared to alcohol regulations in Colorado. Specifically, this paper will examine how recreational marijuana regulations differ from alcohol regulations, and how recreational marijuana regulations and tax often exceed the scope of comparable alcohol regulations and tax.

This paper will also examine Colorado’s Taxpayer’s Bill of Rights with respect to the type and amount of tax applied to recreational marijuana. Colorado’s restrictive tax laws may have helped avert the very thing TABOR seeks to prevent: growth of government through voter-controlled taxation and spending.¹⁰ This type of restrictive tax scheme is unique to Colorado, and worthy of serious consideration by any state seeking to

⁶ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>.

⁷ *Id.*

⁸ See Colo. H.B. 1317, 69th General Assembly (2013); Colo. H.B. 1318, 69th General Assembly (2013).

⁹ *Id.*

¹⁰ Art. X, sec. 20 of the Colorado State Constitution (TABOR).

legalize recreational marijuana in a way similar to Colorado.

Finally, suggestions will be offered to other states about what to consider when legalizing recreational marijuana. Given state-to-state tax variances, it is important to examine and weigh the possible effects of over-taxation prior to handing over tax and spending power to the state legislature. Whether a state legalizes recreational marijuana through ballot initiative or legislative action, there is a significant likelihood that over-taxation will lead to unexpected government growth and corruption (see Figure 1 as an example of the legislative growth in the area of recreational marijuana in Colorado since 2012). If a state seeks to avoid problems associated with excessive government growth, preemptive anticipation and avoidance through proper analysis of the state's laws is recommended.

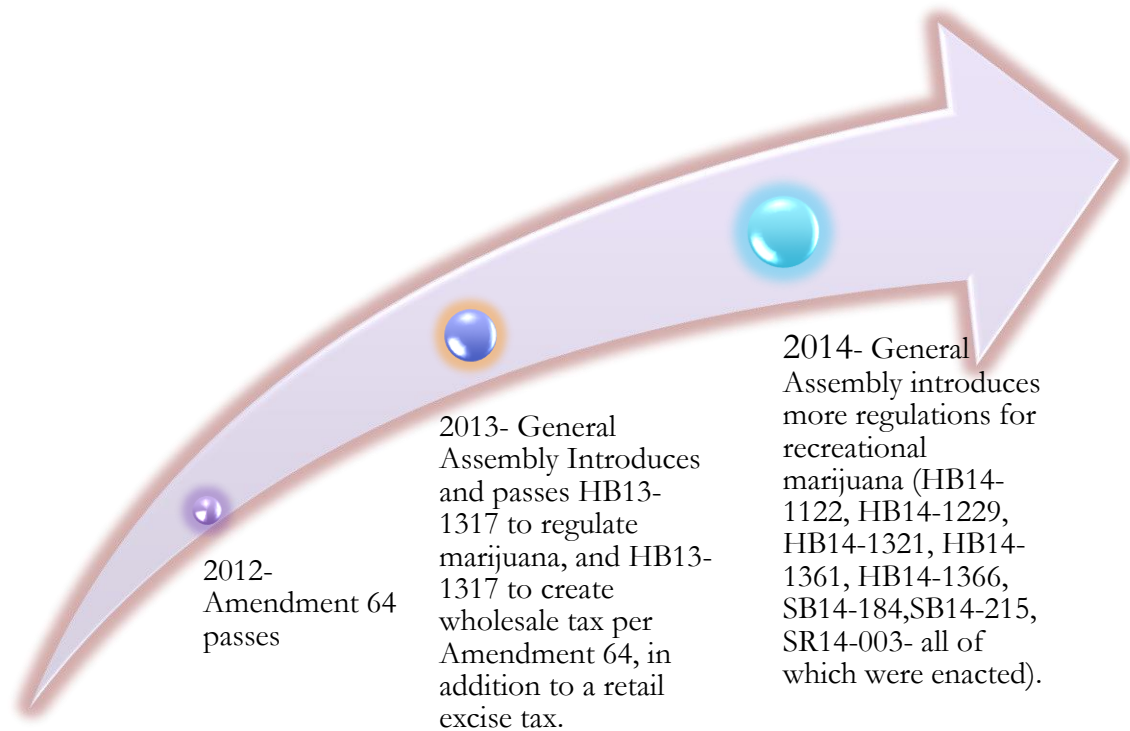


Figure 1. Regulations grow just as rapidly as the recreational marijuana industry in Colorado.

I. BACKGROUND

A. Amendment 64 History

The 2012 Colorado State Election was originally the target of several initiatives to legalize marijuana.¹¹ Amendment 64 and Legalize2012 were two that took differing approaches to legalization.¹² Amendment 64 and Legalize2012 differed in one major respect, regulation.¹³ Legalize2012 was opposed to regulation of any kind. Amendment 64 sought to regulate marijuana like alcohol. Ultimately, Colorado voters spoke by putting Amendment 64 on the 2012 ballot, and passing the initiative to legalize marijuana and regulate it like alcohol.¹⁴

The organization behind Amendment 64 is the Marijuana Policy Project.¹⁵ The official website for the amendment is entitled “Yes on 64: Campaign to Regulate Marijuana like Alcohol.”¹⁶ Legalize2012, asserts that Amendment 64 gives too much authority to the state in regulating the plant.¹⁷ The group behind Legalize2012’s anti-regulation initiative sought to legalize marijuana with no government involvement, and criticized Amendment 64’s comparison of marijuana to alcohol.¹⁸

Amendment 64 passed,¹⁹ but the general assembly still had to draft

¹¹ Legalize 2012: Colorado Marijuana Legalization Ballot Initiative Petition Campaign, COLORADO MARIJUANA LEGALIZATION CAMPAIGN (Feb. 12, 2015), <http://www.legalize2012.com/>; Scot Kersgaard, *Second Colorado marijuana legalization initiative moving forward*, THE COLORADO INDEPENDENT, Jan. 12, 2012 (Feb. 12, 2015) <http://www.coloradoindependent.com/109860/second-colorado-marijuana-legalization-initiative-moving-forward>; Peter Marcus, *Attempts to get initiatives on ballot go by the wind*, THE COLORADO STATESMAN, Aug. 10, 2012 (Feb. 12, 2015), <http://www.coloradostatesman.com/content/993668-attempts-get-initiatives-ballot-go-wind>.

¹² Scot Kersgaard, *Second Colorado marijuana legalization initiative moving forward*, THE COLORADO INDEPENDENT, Jan. 12, 2012 (Feb. 12, 2015) <http://www.coloradoindependent.com/109860/second-colorado-marijuana-legalization-initiative-moving-forward>.

¹³ *Id.*

¹⁴ *Id.*; Campaign to Regulate Marijuana like Alcohol, MARIJUANA POLICY PROJECT (Feb. 12, 2015) <http://www.regulatemarijuana.org>.

¹⁵ Mason Tvert, *Initiative Proponent and Campaign Co-director, Director of Communications*, MARIJUANA POLICY PROJECT, media@mpp.org (Feb. 12, 2015), <http://www.regulatemarijuana.org/media-inquiries>.

¹⁶ Campaign to Regulate Marijuana like Alcohol, MARIJUANA POLICY PROJECT (Feb. 12, 2015) <http://www.regulatemarijuana.org>.

¹⁷ *Models to Re-legalization of Cannabis (Marijuana)*, LEGALIZE 2012 (Feb. 10, 2015), <http://www.legalize2012.com/models.legalization.html>.

¹⁸ *Id.*

¹⁹ Compared to other efforts to legalize marijuana, such as Legalize2012, this writer believes Amendment 64 was successful in that it was the only legalization attempt that had

regulations, and present a tax proposition for voter approval as required by the new amendment.²⁰ The General Assembly would need to create regulations for the minimum age requirement of 21 years for sale; proof of age requirement for sale; driving under the influence of marijuana; allowing legitimate business people to participate in marijuana industry; and proper labeling requirements.²¹ As it turns out, the Colorado General Assembly had different ideas in mind. The following section points to areas where the limited scope offered by Amendment 64 was expanded upon by HB13-1317, specifically in how marijuana is “similarly” regulated like alcohol.

a regulatory scheme. It is this writer’s contention that without guaranteed regulations, the public is less comfortable legalizing a substance with such recent history of negative social, criminal, legislative, and media associations. This writer also believes the attachment of school funding to the proposed tax in Amendment 64 equalized many negative perceptions of the aforementioned negative historical associations. This area deserves further research.

²⁰ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015), at 28.

²¹ *See Id.*

Amendment 64

Created and placed on the ballot
through petition by the Marijuana Policy
Project
- To regulate marijuana like alcohol

House Bill 13-1317

General Assembly enacts regulations to
implement Amendment 64.

House Bill 13-1318

General Assembly enacts tax scheme in
accordance with Amendment 64, and
creates a retail excise tax.

**Other subsequently enacted bills
and resolutions***

HB14-1122- Keep Legal Marijuana From
Those Under 21 (exit packaging);

HB14-1229-Retail Marijuana
Fingerprint Check Local Authority;

HB14-1321- Membership Task Force
Drunk Impaired Driving;

HB14-1361- Regulation Of Marijuana
Concentrates;

HB14-1366- Sale Of Edible Marijuana
Products;

SB14-184- Oversight of the Industrial
Hemp Program

SB14-215- Disposition Of Legal
Marijuana Related Revenue

SR14-003- Financial Services For
Marijuana Businesses

Proposition AA

Placed on the ballot for voter approval of
HB13-1318 tax scheme. Voters approve
the proposition as required by the
Colorado Taxpayer's Bill of Rights
(TABOR).

**More legislation exists in both active and failed phases beyond those listed here. The above legislation is specific to recreational marijuana, but is not exhaustive of regulations relating to Amendment 64.*

Regulate like alcohol

To establish regulatory power, HB13-1317 was drafted and passed.²² HB13-1317 addresses many operational rules associated with Amendment 64.²³ The bill also introduces some confusion as to what it means to regulate recreational marijuana like alcohol.

Amendment 64 clarifies specific ways to regulate recreational marijuana like alcohol, but HB13-1317 goes to a new level of regulation by broadening the restrictions associated with marijuana sales well-beyond what is mentioned in Amendment 64.²⁴ In broadening the meaning of Amendment 64, the general assembly oversteps its bounds by failing to maintain consistency with marijuana and alcohol regulations. Some could argue the general assembly is within its powers to regulate the effect of the state law, however, the government's interest must be served by its regulations, and some regulations in HB13-1317 do not present a rational basis. The following section will compare the most apparent regulations that not only reach beyond the purpose of Amendment 64, but actually contradict the very guidance offered by Amendment 64.

HB13-1317- Regulating Recreational Marijuana Business

The Colorado General Assembly created detailed rules for the regulation of the recreational marijuana industry in HB13-1317.²⁵ While it is conceded that Amendment 64 was somewhat shortsighted in its way to regulate marijuana like alcohol, the general assembly left little unturned in the areas not addressed by Amendment 64. The following is not an exhaustive list, but a glaringly obvious list of what the general assembly has done to change the meaning of regulating marijuana like alcohol:

HB13-1317 establishes a state licensing authority, which is the Colorado Department of Revenue (DOR).²⁶ The DOR will adopt regulations and oversee the Marijuana Enforcement Division (MED).²⁷ The MED is funded by the Marijuana Cash Fund, which has been established to hold tax funds, both from the wholesale tax afforded by Amendment 64, and the retail excise tax established by HB13-1318.²⁸

HB13-1318, the tax companion to HB13-1317, affords localities an appropriation depending on the number of marijuana facilities within said

²² See Colo. H.B. 1317, 69th General Assembly (2013).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, the MED was previously the MMED (Medical Marijuana Enforcement Division), and was changed to the MED upon passage of the Colo. H.B. 13-1317 and H.B. 13-1318 (*infra* note 28).

²⁸ See Colo. S. 215, 69th General Assembly (2014).

locality.²⁹ According to the bill, 15% of the retail sales tax will be appropriated to the localities accordingly.³⁰ 85% of the retail tax goes to the Old Age Pension Fund,³¹ with the remaining amount to the Marijuana Cash Fund as established under SB14-215.³²

The wholesale tax established by Amendment 64 is reserved to the General Construction Fund in the sum of \$40M, with the remaining amount credited to the Marijuana Cash Fund.³³ The Marijuana Cash Fund is the source of financing for the MED.³⁴ The MED is authorized to use these funds for many objectives.³⁵ Many marijuana regulations appear to support objectives that contradict the idea of treating recreational marijuana like alcohol.

These contradictory regulations include:

- Seed to sale tracking system³⁶
- Testing products for adulterants and toxins³⁷
- Government issued IDs for retail owners, managers, and employees³⁸
- Periodical literature containing marijuana content must be sold from behind the counter in places where age restrictions do not exist to enter³⁹
- Special packaging to exit a retail marijuana store with marijuana⁴⁰
- May regulate the amount of marijuana grown throughout the state⁴¹

The regulations further restrict certain people from licensure.⁴² Aside from the expected limitations of age and criminal background, the following individuals are not allowed licenses:

- A sheriff, deputy sheriff, police officer, or prosecuting officer, or an officer or employee of the state licensing authority;⁴³

²⁹ See Colo. H.B. 1318, 69th General Assembly (2013).

³⁰ *Id.*

³¹ COLO. CONST., art. XXIV (1936), a fund created to collect all excise taxes in Colorado.

³² Colo. H.B. 1318, 69th General Assembly (2013).

³³ *Id.*

³⁴ See Colo. S. 215, 69th General Assembly (2014).

³⁵ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-202, powers and duties of state licensing authority.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 12-43.4-306, persons prohibited as licensees.

⁴³ *Id.*

- A person who has not been a resident of Colorado for at least two years prior to the date of the owner's application, and all associated with the business operation (owner, manager, employees, etc.) must be Colorado residents upon date of license application.⁴⁴

Operators of retail, cultivation, testing facilities, and products manufacturers are issued occupational licenses (upon MED application approval), and MED IDs must be worn while working in the marijuana facility.⁴⁵ In addition to these limitations, the state also limits the amount of marijuana that can be sold to a person with an out-of-state ID to ¼ ounce per transaction.⁴⁶ Retail marijuana stores may not sell nicotine products or alcohol, but may sell marijuana periodicals without keeping them behind a counter.⁴⁷ Lastly, the bookkeeping records of any recreational marijuana business must be available for inspection during regular business hours, and during all other hours the facility is open for business.⁴⁸

The application fees for a marijuana business license under HB13-1317 are \$5,000.⁴⁹ Half of this money is allocated to the Marijuana Cash Fund, and the other half goes to the locality where the business will operate.⁵⁰ Licensed medical marijuana businesses in existence at the time of the Amendment 64's passage were given a reduced fee option.⁵¹ Fees for alcohol business licensure are approximately half of the base rate of the least expensive retail marijuana business license fee.⁵²

Other Recreational Marijuana Regulations

Subsequent legislation has further widened the gap between marijuana and alcohol regulation schemes. HB14-1229 was passed to require those applying for a state retail marijuana establishment license to submit their fingerprints with their application to be run through the Colorado Bureau of Investigations database.⁵³ Once a criminal check is complete, the locality may use the information to determine whether the applicant is qualified for licensure.⁵⁴

HB14-1122 was passed to keep recreational marijuana from individuals

⁴⁴ *Id.*

⁴⁵ *Id.* at 12-43.4-202, powers and duties of state licensing authority.

⁴⁶ *Id.* at 12-43.4-402, retail marijuana store license.

⁴⁷ *Id.*

⁴⁸ *Id.* at 12-43.4-701, inspection procedures.

⁴⁹ *Id.* at 12-43.4-501, fees.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Colo. Liquor Retail License Application, COLO. DEPT. OF REV., May 7, 2009 (Feb 12, 2015),

<https://www.denvergov.org/Portals/723/documents/RetailLiquorLicenseApplication.pdf>.

⁵³ Colo. H.B. 1229, 69th General Assembly, at 12-43.4-306 (2014), persons prohibited as licensees - definitions.

⁵⁴ *Id.*

under 21 years of age, and is formulated to achieve this goal by requiring childproof packaging for all retail purchases.⁵⁵ Those with dexterity issues can bring in a doctor's note and the childproof container requirement may be waived.⁵⁶

Tax like alcohol

Recreational marijuana in Colorado sees three taxes throughout its movement from wholesale to consumer. The first tax was initiated by Amendment 64, and applies to the first wholesale transaction, usually between the cultivator and the retailer or products manufacturer.⁵⁷ The second tax is authorized through HB13-1318 and then by voters of Proposition AA.⁵⁸ This excise tax is applied at the retail exchange.⁵⁹ The final tax is a state sales tax, and applies to all marijuana sales, medical and recreational.⁶⁰ Localities may also apply a tax,⁶¹ but appropriations determined by HB13-1318⁶² for retail sales may encourage localities to refrain from adding another tax.

HB13-1318 and Proposition AA

Under Amendment 64, the Colorado General Assembly had to determine the proper excise tax to apply to transactions between wholesaler and retailer or manufacturer before January 1, 2017.⁶³ This tax may not exceed fifteen per cent.⁶⁴ After January 1, 2017, the general assembly is allowed to apply whatever rate it wishes.⁶⁵ The caveat with this tax is that the first \$40M be applied to the Public School Capital Construction Fund.⁶⁶ The remaining surplus, if any, is moved to the Marijuana Cash Fund.⁶⁷ This tax applies only to recreational *wholesale* transactions, not medical

⁵⁵ Colo. H.B. 1122, 69th General Assembly, at 12-43.4-306 (2014).

⁵⁶ *Id.* at 12-43.3-202, powers and duties of state licensing authority.

⁵⁷ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015); Amendment 64 Use and Regulation of Marijuana (as passed Nov. 6, 2012), <http://www.fcgov.com/mmj/pdf/amendment64.pdf>.

⁵⁸ See Colo. H.B. 1318, 69th General Assembly (2013); Proposition AA Retail Marijuana Taxes, *pursuant to* Colo. H.B. 13-1318 (as passed by ballot, Nov. 5, 2013), <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2013-2014/PropositionAAText.pdf>.

⁵⁹ See Colo. H.B. 1318, 69th General Assembly (2013).

⁶⁰ *Id.* at 39-28.8-202, retail marijuana sales tax.

⁶¹ *Id.* at 39-28.8-203, disposition of collections.

⁶² *Id.* at 17-18-109.

⁶³ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015), at 5(d).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

marijuana transactions of any kind.⁶⁸

The general assembly took full advantage of the 15% cap and voters approved this legislative recommendation by passing Proposition AA.⁶⁹ Voters simultaneously approved a maximum 15% tax on *retail* exchanges in addition to the 15% tax allowed for wholesale exchanges in Proposition AA.⁷⁰ The passage of Proposition AA allows the State of Colorado to collect up to 30% of the money exchanged from wholesale to retail transactions in addition to state sales tax.⁷¹

HB13-1318- Applying tax to recreational marijuana per Amendment 64

Amendment 64 required the general assembly enact an excise tax to be levied upon marijuana sold or otherwise transferred by a marijuana cultivation facility to a marijuana product manufacturing facility or to a retail marijuana store.⁷² This rate is not to exceed fifteen percent, and the first \$40M to be credited to the Public School Capital Construction Assistance Fund.⁷³ The specific tax mentioned in Amendment 64 is a minimal requirement, and does not limit other taxes from being applied.⁷⁴

The general assembly created a retail excise tax in addition to the wholesale excise tax required by Amendment 64.⁷⁵ The retail tax is set at 10%, but has a 15% cap and applies to the retail transaction on all marijuana and marijuana products.⁷⁶ State and local sales tax also applies in addition to the retail tax.⁷⁷

As required by Article XXIV for *all* Colorado excise taxes, the general assembly has directed that 85% of the retail tax go to the state's excise tax fund, which is the Old Age Pension Fund.⁷⁸ The other 15% of retail tax revenue is apportioned to the localities where recreational retail marijuana businesses operate.⁷⁹ The apportionment is determined by the percentage of total sales tax revenues by county.⁸⁰ Counties are not directed how to use

⁶⁸ *Id.*

⁶⁹ Proposition AA Retail Marijuana Taxes, *pursuant to* Colo. H.B. 13-1318 (as passed by ballot, Nov. 5, 2013).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Colo. H.B. 1318, 69th General Assembly (2013).

⁷⁶ *Id.* at 39-28.8-202, retail marijuana sales tax.

⁷⁷ *Id.*

⁷⁸ *Id.* 39-28.8-203, disposition of collections; COLO. CONST., art. XXIV.

⁷⁹ Colo. H.B. 1318, 69th General Assembly (2013), at 39-28.8-203, disposition of collections.

⁸⁰ *Id.*

these funds.⁸¹ After the Old Age Pension Fund and county apportionments are satisfied, any surplus is credited to the Marijuana Cash Fund to be used for the enforcement of regulation on the retail marijuana industry and for other purposes of the fund as determined by the general assembly.⁸² The administration of this section is also funded out of the Marijuana Cash Fund.⁸³

Taxpayer's Bill of Rights

One unique force at play in Colorado is the Taxpayers Bill of Rights (hereinafter referred to as "TABOR").⁸⁴ TABOR was passed by voters in 1992, and the purpose was to limit government growth.⁸⁵ TABOR is unlike any tax scheme in the country,⁸⁶ and is an integral consideration for other states seeking to legalize recreational marijuana.

The result of Proposition AA and HB13-1318 was the general assembly sought to push a 30% (and sometimes more, depending on local tax rates), tax on the retail consumer through various taxes applied throughout the wholesale to retail process.⁸⁷ This type of taxation may have gone without notice in many states lacking spending and revenue limits, but Colorado's TABOR offers protection to its citizens from over-reaching lawmakers seeking to grow the government in Colorado.⁸⁸ Now, the over-taxation has become part of a surplus,⁸⁹ which as required by TABOR, will be returned to Colorado Taxpayers unless the voters decide otherwise.⁹⁰

While the surplus is returned to Colorado taxpayers,⁹¹ the people paying this tax are not limited to Colorado taxpayers. In this way, Colorado taxpayers are benefitting from a tax on non-residents, and non-residents can only experience an equal tax in Colorado if the tax is applied at a proper rate so that said tax does not result in a surplus, which must be returned to the Colorado taxpayers under TABOR.⁹²

HB13-1318 acknowledges the taxes it imposes must yield to the Colorado-specific Taxpayer's Bill of Rights (TABOR).⁹³ TABOR is

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Art. X, sec. 20 of the Colorado State Constitution (TABOR).

⁸⁵ *Id.*

⁸⁶ *Colorado's TABOR*, THE BELL POLICY CENTER (02/23/2015).

⁸⁷ Proposition AA Retail Marijuana Taxes, *pursuant to* Colo. H.B. 13-1318 (as passed by ballot, Nov. 5, 2013); Colo. H.B. 1318, 69th General Assembly (2013).

⁸⁸ Colo. Const., art. X, § 20 (TABOR).

⁸⁹ Millions in marijuana tax revenue to be refunded, unless Colo. Legislature acts to Defend TABOR, the TABOR Foundation, & TABOR Committee. 02/19/2015

⁹⁰ Colo. Const., art. X, § 20 (TABOR).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Colo. H.B. 1318, 69th General Assembly (2013), at 39028.8-203, disposition of

established in Section 20 of Article X of the Colorado State Constitution, which has stated a “preferred interpretation that the law shall reasonably restrain most the growth of government.”⁹⁴

TABOR requires that revenue from sources not excluded from fiscal year spending which exceed limits otherwise stated in TABOR be refunded in the next fiscal year, unless voters approve a revenue change as an offset.⁹⁵ TABOR’s purpose is to prevent the state from using taxes to profit, and requires that taxes serve a very clear and specific function.⁹⁶ Surpluses are not automatically reabsorbed into the General Fund, rather they are refunded to the taxpayers.⁹⁷

To further explain the purpose behind, *Interrogatories on Senate Bill 93-74* clarifies that when revenues of the state or local government increase beyond the allowed limits on fiscal year spending, any excess above the allowed limit or voter-approved increase must be refunded to the taxpayers.⁹⁸ The concept of limited government has typically been recognized in Colorado lawmaking, but this concept seemingly went unrecognized until the 30%+ tax on recreational marijuana generated a \$40M surplus.⁹⁹

Other Tax-Related Legislation

HB13-1042¹⁰⁰ is a particularly interesting piece of legislation. Due to the conflicting federal and state laws regarding marijuana, the state allows the federal adjusted gross income, as it applies to the state income tax, to be calculated as if the federal tax scheme did not prohibit claiming federal income from marijuana business.¹⁰¹ While this law does not help marijuana businesses with their federal tax obligations, it reduces their obligations to reflect the state’s laws.¹⁰²

IV. Analysis

When Amendment 64 was introduced to voters, the primary assertion was that the amendment would act to regulate marijuana like alcohol.¹⁰³ In digging deeper, it appears that this comparison in regulatory schemes was

Collections.

⁹⁴ Colo. Const., art. X, § 20 (TABOR).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1 (Colo. 1993).

⁹⁹ Millions in marijuana tax revenue to be refunded, unless Colo. Legislature acts to Defend TABOR, the TABOR Foundation, & TABOR Committee. 02/19/2015

¹⁰⁰ Colo. H.B. 1042, 69th General Assembly (2013).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Regulating Marijuana Works! Yes on Amendment 64: The Colorado Campaign to Regulate Marijuana Like Alcohol (<http://www.regulatemarijuana.org/regulationworks>).

limited to minimum 21 years of age to consume and purchase, proving age during purchase, legitimizing marijuana industry, and requiring proper labeling.¹⁰⁴ The amendment also calls to tax marijuana in a manner similar to alcohol.¹⁰⁵

Some recreational marijuana regulations are not comparable to alcohol regulations, because those types of regulations don't exist within the DOR regulations regarding alcohol.¹⁰⁶ The following marijuana regulations present a substantial departure from alcohol regulations, and call to question whether the general assembly is operating outside its powers with these overbroad and arbitrary recreational marijuana regulations.

Seed to Sale Tracking

The MED was required to develop and maintain a seed-to-sale tracking system that tracks retail marijuana from either seed or immature plants stage to the point marijuana and marijuana products are sold to a customer at a retail store, to ensure that no marijuana grown or processed by a retail marijuana establishment is sold or otherwise transferred except by a retail marijuana store.¹⁰⁷ No rule exists in the Colorado Liquor Rules that requires tracking, nor does a similar rule exist in the Colorado Liquor Code.¹⁰⁸

This rule presumes that retail establishment's plants will produce the same amount of marijuana, and requires that the harvest stage involve heightened oversight by the MED.¹⁰⁹ There also seem to be a number of ways to defeat the purpose of the seed-to-sale system (inventory control), and the cost of the system may discourage proper compliance.¹¹⁰

Alcohol manufacture is not tracked in this way, and yet alcohol ends up in the wrong hands regularly. Even if alcohol were tracked like marijuana in the seed-to-sale system, the size of the alcohol industry would make for a cumbersome process in which its efficacy would be far outweighed by its burden on the industry. The marijuana industry may be better able to handle the burden currently given its limited size, but as the industry grows, so will the burden of such minutia in day-to day operation on a large scale.

Testing Products

¹⁰⁴ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

¹⁰⁵ *Id.*

¹⁰⁶ Colorado Liquor Rules, 1 C.C.R. § 203-2.

¹⁰⁷ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-202, powers and duties of state licensing authority.

¹⁰⁸ https://www.colorado.gov/pacific/sites/default/files/Liquor%20Code%202013_0.pdf

¹⁰⁹ <http://www.csindy.com/coloradosprings/colorado-starts-tracking-seed-to-sale-but-is-it-worth-it/Content?oid=2816597>

¹¹⁰ *Id.*

HB13-1317 requires the MED establish a testing process to ensure minimum standards of quality for human consumption of marijuana and marijuana products. The testing shall include, but is not limited to analysis for residual solvents, poisons or toxins; harmful chemicals; dangerous molds or mildew; filth; and harmful microbials such as E. Coli or salmonella and pesticides.¹¹¹ Testing shall also include potency for label verification.¹¹²

While alcohol is monitored for adulterants and potency, this is not a task of the DOR in its regulations of alcohol sales.¹¹³ Alcohol is often produced outside the state, and the DOR has no say in regulating the product manufacture, but rather the Federal Alcohol Act offers the Alcohol and Tobacco Tax and Trade Bureau the authority to oversee manufacture of alcohol for retail consumption in the United States.¹¹⁴ Given this conundrum presents a self-defeating law to regulate marijuana like alcohol when the federal government does not afford this possibility, it makes sense that the DOR is acting in place of the federal government. This issue will be resolved when the federal government creates an equivalent regulatory scheme for marijuana as it has for alcohol manufacture.

Government Issued IDs

Retail owners, managers, and employees are required to obtain a special government-issued ID to work in a retail marijuana facility.¹¹⁵ No such ID requirement exists for liquor stores or facilities selling liquor to the public.¹¹⁶ The closest liquor license to the marijuana ID is the Hotel and Restaurant Manager license.¹¹⁷ This is a license, and not an ID required to be worn by the licensee as is required with the marijuana ID.¹¹⁸

The purpose of this rule is to prevent unauthorized access to areas where marijuana is kept prior to retail sale.¹¹⁹ Given that underage theft does occur at liquor stores, it reasonable that these regulations may prevent grab-and-go type theft that sometimes happen at liquor stores. It is not clear why the state has a greater concern that marijuana be accessed by unauthorized individuals, but alcohol has yet to be of such concern that the same

¹¹¹ *Id.*, at 12-43.4-202, powers and duties of state licensing authority.

¹¹² *Id.*

¹¹³ Colorado Liquor Rules, 1 C.C.R. § 203-2.

¹¹⁴ Federal Alcohol Administration Act, 27 U.S.C.

¹¹⁵ *Id.*, at 12-43.4-309, licensing in general.

¹¹⁶ *See generally* Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015), https://www.colorado.gov/pacific/sites/default/files/Liquor%20Code_0.pdf.

¹¹⁷ Colo. Liquor Retail License Application, COLO. DEPT. OF REV., May 7, 2009 (Feb 12, 2015).

¹¹⁸ *Id.*; Colo. H.B. 1317, 69th General Assembly (2013).

¹¹⁹ H.B. 1317, 69th General Assembly (2013), at 12-43.4-105, limited access areas.

requirement applies to liquor stores.¹²⁰

Marijuana Periodicals

No rules exist limiting the sales of alcohol content in magazines in Colorado's Liquor Rules,¹²¹ however, the same is not the case for recreational marijuana regulations.¹²² HB13-1317 requires that marijuana periodicals sold in locations where those under 21 years of age are allowed be kept behind the counter.¹²³

While magazines related to alcohol tend to be directed at connoisseurs and may be associated with affluent lifestyles,¹²⁴ it seems that targeting marijuana magazines is content-based and impedes on a fundamental right. Without serving a significant government interest, this regulation may unconstitutionally restrict free speech.¹²⁵

Exit Packaging

HB13-1317 requires that marijuana be in special packaging for transport or exiting the store.¹²⁶ Liquor stores are not required to provide a bag, nonetheless a locking bag, to exit the store with alcohol.¹²⁷ Requiring special packaging to exit the store serves little function when compared to the fact that a person can walk out of a liquor store with cases of beer, bottles of grain alcohol, and the buyer's children can help carry the items to the car.¹²⁸ Add to this the fact that one must be 21 years of age to enter a retail marijuana establishment,¹²⁹ and the possible similarities between marijuana and alcohol regulations breach non-existence.

In an almost comical way, HB13-1317 allows a retail customer to bring

¹²⁰ See Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015).

¹²¹ *Id.*

¹²² Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-202, powers and duties of state licensing authority.

¹²³ *Id.*

¹²⁴ WINE ENTHUSIAST (Feb 12, 2015), <http://www.winemag.com/>; FOOD & WINE (Feb 12, 2015), <http://www.foodandwine.com/>; WINE SPECTATOR (Feb 12, 2015), <http://www.winespectator.com/>; TEQUILA AFICIONADO (Feb. 12, 2015), <http://tequilaaficionado.com/>; and many others exist.

¹²⁵ *Fundament Right*, CORNELL LEGAL INFORMATION INSTITUTE (Feb. 10, 2015), https://www.law.cornell.edu/wex/fundamental_right.

¹²⁶ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-202, powers and duties of state licensing authority; Picture shows bag used at The Green Solution. Not all exit packaging is the same according to locals. Some facilities use bottles similar to prescription bottles, with childproof lids.

¹²⁷ Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015).

¹²⁸ *Id.*

¹²⁹ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

in a doctor's note to be exempted from the child-proof packaging requirement for taking marijuana products out of the store.¹³⁰ Nowhere in pharmaceutical packaging rules, or alcohol packaging rules, exists such an exception that involves a doctor's note.¹³¹

Adults are presumed to be responsible with alcohol (hence the minimum age requirement) and in preventing children from accessing pharmaceuticals.¹³² When it comes to pharmaceuticals, adults are allowed to choose for themselves whether they require non-childproof containers.¹³³ Pharmacies do not require a doctor's note to give a patient a bottle they can access.¹³⁴

The requirement that an adult present a doctor's note to obtain a non-childproof container to purchase recreational marijuana defeats the idea that adults over 21 are capable of making proper decisions in keeping marijuana out of the hands of those who should not have it. Further, the requirement that marijuana be contained within a childproof container only guarantees that a small child will have a difficult time accessing that marijuana from the moment it is purchased to the moment it leaves the store where children are not allowed.

Prohibited Licensees

The Colorado Liquor Rules do not prohibit people working in certain professions from owning, running, or working in the retail liquor industry.¹³⁵ This is not the case for recreational marijuana businesses.¹³⁶ Police, prosecutors, and individuals working for the DOR or MED are specifically prohibited from acting as a licensee in a recreational marijuana business.¹³⁷

There is some logic to this restriction, because marijuana is still illegal

¹³⁰ Colo. H.B. 1317, 69th General Assembly (2013).

¹³¹ Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015).

¹³² *Id.*

¹³³ It is presumed with pharmaceutical medications that patients need the medication in the bottle, so they should not need an additional note from the prescribing doctor to give the patient and additional "option" to have a different container for their medicine. A doctor's note is slipping into privacy matters for recreational use that seem disproportionate to the ultimate result that a person can take the marijuana out of the bag and hand it to a baby as soon as they walk out of the retail facility with it in a locked bag.

¹³⁴ Called local CVS in Wareham, Massachusetts to verify that there is no doctor involvement in childproof containers for pharmaceutical medication, and was informed that it is the patient's option. No doctor's note is required for non-childproof containers for pharmaceutical medications.

¹³⁵ Colorado Liquor Rules, 1 C.C.R. § 203-2.

¹³⁶ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-306, persons prohibited as licensees.

¹³⁷ *Id.*

federally.¹³⁸ At the same time, to completely ban this classification of individuals from participating in a business opportunity appears to encroach on equal protection,¹³⁹ specifically the law enforcement class' ability to own property by the same liberty afforded other classes.¹⁴⁰

For instance, a police officer may not own any part of a medical marijuana business.¹⁴¹ This limitation on police to own property that the state law allows other citizens to own seems a little unfair now, and as the federal rules change to accommodate states' marijuana laws,¹⁴² the restriction on property ownership of certain classes will become more unconstitutional.

Residency Requirement

Liquor store owners, managers, and employees need not be residents of Colorado to own, run, or work in a liquor store.¹⁴³ As mentioned above, liquor store employees are not required to acquire a special license either,¹⁴⁴ so there is no reason for the DOR to know where a liquor store owner resides, much less prevent these individuals from residing outside the state. Employees in marijuana facilities must be residents upon applying for a license, and owners must be a resident of Colorado for two years prior to applying for a license.¹⁴⁵

While the recreational marijuana residency requirement on its own

¹³⁸ Federal Trafficking Penalties for Marijuana, Hashish and Hashish Oil, Schedule I Substances, Drug Enforcement Agency; Note- Congress passed H.R.83 in December of 2014, which disallows federal agents from raiding state regulated medical marijuana businesses. H.R.83 - Making consolidated appropriations for the fiscal year ending September 30, 2015, and for other purposes, 113th Congress (2013-2014) (Sec. 538. None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana), (Dec. 30, 2014), [https://www.congress.gov/bill/113th-congress/house-](https://www.congress.gov/bill/113th-congress/house-bill/83/text?q=%7B%22search%22%3A%5B%22hr83+medical+marijuana%22%5D%7D)

[bill/83/text?q=%7B%22search%22%3A%5B%22hr83+medical+marijuana%22%5D%7D](https://www.congress.gov/bill/113th-congress/house-bill/83/text?q=%7B%22search%22%3A%5B%22hr83+medical+marijuana%22%5D%7D)

¹³⁹ *Equal Protection*, CORNELL UNIVERSITY LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/equal_protection.

¹⁴⁰ *Id.*

¹⁴¹ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-306, persons prohibited as licensees.

¹⁴² See *supra* note 138.

¹⁴³ Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015).

¹⁴⁴ *Id.*

¹⁴⁵ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.4-306, persons prohibited as licensees.

would most likely survive constitutional challenge, it is a striking difference than what is required in the liquor industry. This fact may support a challenge on the basis that the regulations created in HB13-1317 do not coincide with the voter's intent when they passed Amendment 64, because this marijuana residency requirement is too far removed from any similar alcohol regulation.

Out-of-State Customers

HB13-1317 limits the amount of marijuana and marijuana products out-of-state customers may purchase during a single transaction.¹⁴⁶ In state customers may purchase up to once ounce, while out-of-state customers are limited to ¼ ounce at a time.¹⁴⁷ Liquors stores do not apply different limits to amounts of alcohol purchased based on residency,¹⁴⁸ though some states may regulate how much alcohol can be brought in from other states.¹⁴⁹ The issue of preventing people from illegally entering another state is not a regulation for Colorado to bother itself with, but rather one for other states to handle as they shall so best decide.

While liquor stores do not have a general limit on amounts any one person can purchase at one time, recreational retail limits were established by Amendment 64.¹⁵⁰ Still, the method to achieve the presumed function to limit out-of-state transport of marijuana stands to question whether the implemented method is capable of preventing Colorado marijuana from reaching other states, or vice versa.

Compared with Colorado residents, Amendment 64 allows out-of-state residents to possess the same quantity while in Colorado.¹⁵¹ Limiting purchase amounts by transaction means out-of-state money will spread to more retail establishments, or require the out-of-state customer to visit the retail establishment more frequently. This inconvenience doesn't seem to deter the out-of-state export of any particular amount of marijuana or marijuana product.¹⁵²

¹⁴⁶ *Id.* at 12-43.4-402, retail marijuana store license.

¹⁴⁷ *Id.*; 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

¹⁴⁸ Colorado Liquor Rules, 1 C.C.R. § 203-2; Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015).

¹⁴⁹ Alcohol Beverage Authorities in United States, Canada, and Puerto Rico, State and Local Laws, Alcohol and TOBACCO TAX AND TRADE BUREAU (Feb. 12, 2015), <http://www.ttb.gov/wine/state-ABC.shtml>.

¹⁵⁰ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

¹⁵¹ *Id.*

¹⁵² Trevor Hughes, *Colorado sued by neighboring states over legal pot*, THE DENVER POST, 18 Dec. 2014, <http://www.usatoday.com/story/news/nation/2014/12/18/colorado->

Taxes

Alcohol in Colorado is taxed by type of beverage and volume. Liquor is taxed at \$2.28 per gallon, while wine is 28 cents per gallon, and beer eight cents per gallon.¹⁵³ Recreational marijuana in Colorado is taxed at rates that vary by use type and point of sale.¹⁵⁴ Medical marijuana sales are taxed by the state at a rate of 2.9%, while recreational sales tax is 10% during a retail exchange, and 15% when the wholesale exchange occurs.¹⁵⁵

The differences in the alcohol and marijuana tax schemes may be necessary, but the liquor tax scheme in Colorado exempts manufacturers from state liquor tax when shipping out of state.¹⁵⁶ The total tax on marijuana from manufacture to use is 25%, though the sales price may differ at each stage, and local taxes may apply.¹⁵⁷

Amendment 64 requires “the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund.”¹⁵⁸ Section 5(d) specifically states that the general assembly shall enact an excise tax not to exceed 15% for the transfer of marijuana from a cultivator to a marijuana-infused product manufacturer or retailer.¹⁵⁹ Note that the language in Amendment 64 is limiting in its use of “not to exceed,” so technically, the general assembly does not need to tax this exchange at 15%, but may do so.¹⁶⁰

The state creates an additional 10% tax on the retail exchange of any marijuana products, be they plant matter or marijuana-infused products.¹⁶¹ Voters approved Proposition AA in 2013, which allows up to a 15% tax on retail exchanges in addition to the 15% tax allowed for wholesale exchanges

marijuana-lawsuit/20599831/.

¹⁵³ *Tax Facts: Alcohol Rates 2000-2010, 2013-2014*, TAX POLICY CENTER (June 10, 2014), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=349>

¹⁵⁴ Joseph Henchmen, *Taxing Marijuana: The Washington and Colorado Experience*, TAX FOUND. (Aug 25, 2014), <http://taxfoundation.org/article/taxing-marijuana-washington-and-colorado-experience>

¹⁵⁵ *Id.*

¹⁵⁶ Excise 12, Colo. Alcohol Beverage Wholesalers and Mfg., COLO. DEPT. OF REVENUE, Taxpayer Serv. Div., (Nov., 2013), <https://www.colorado.gov/pacific/sites/default/files/Excise12.pdf>.

¹⁵⁷ Proposition AA Retail Marijuana Taxes, *pursuant to* Colo. H.B. 13-1318 (as passed by ballot, Nov. 5, 2013), <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2013-2014/PropositionAAText.pdf>.

¹⁵⁸ Amendment 64 Use and Regulation of Marijuana (as passed Nov. 6, 2012), <http://www.fcgov.com/mmj/pdf/amendment64.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Proposition AA Retail Marijuana Taxes, *pursuant to* Colo. H.B. 13-1318 (as passed by ballot, Nov. 5, 2013).

under Amendment 64.¹⁶² Under this subsequent amendment to the tax scheme in Amendment 64, the State of Colorado can collect up to 30% of the money exchanged from wholesale to retail transactions,¹⁶³ keeping in mind that up to 15% of this total may be the higher-quantity, lower-priced product exchange of wholesale. In either case, the consumer ultimately absorbs the cost.

Under the current alcohol tax scheme, even when the sale is for the most potent form of alcohol, the tax is nowhere near the effect of the substance. When taxed at \$2.28 per gallon, an inexpensive gallon of vodka is taxed \$2.28 for \$65 of alcohol.¹⁶⁴ An expensive gallon of tequila is taxed \$2.28 for \$1,075 of liquor.¹⁶⁵ Meanwhile, a high-grade ounce costing \$475 is taxed \$118.75.¹⁶⁶ This disparity hardly seems to fit the intent of the original amendment to tax marijuana like alcohol,¹⁶⁷ because alcohol in Colorado is being taxed by volume while marijuana is being taxed by price.

Licensing Fees

Colorado's liquor fees consist of an application fee and a license fee. The application fee ranges from \$1,025-\$1,125.¹⁶⁸ The license fees range from \$75-\$750.¹⁶⁹ A new recreational marijuana business owner must also pay an application fee and initial license fee.¹⁷⁰ Depending on the type of business, application fees range from \$1,000 for testing facilities, to \$5,000

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *360 Organic Vodka Double Chocolate 70* (cost \$12.99 per 750ML), LIQUOR MART, Boulder, Colo. (accessed Dec. 30, 2014), <http://www.liquormart.com/liquor/360-organic-vodka-double-chocolate-70-18109.html>

¹⁶⁵ *Patron Gran Reserve Platinum Tequila* (cost \$215.99 per 750ML), LIQUOR MART, Boulder, Colo. (accessed Dec. 30, 2014), <http://www.liquormart.com/liquor/patron-gran-reserve-platinum-tequila-18027.html>

¹⁶⁶ *"Cindy White"* (cost \$448.95 per ounce on the Denver Menu), THE GREEN SOLUTION DISPENSARY (accessed Dec. 30, 2014), <http://tgscolorado.com/menu-denver>

¹⁶⁷ It should be noted that taxation is considered regulatory as the Colorado Department of Revenue collects taxes for the state of Colorado, and the DOR regulates the retail marijuana industry in the state. The Colorado DOR originally operated under the police power established in the Medical Marijuana Code, and has since allowed for the regulation of retail marijuana sales under 1 CCR 212-2, Permanent Rules Related to the Colorado Retail Marijuana Code, COLO. DEPT. OF REVENUE, Medical Marijuana Enforcement Div., Medical Marijuana Inventory Tracking System, Request for Proposal #DOR11009/Inventory SW (revised Apr. 13, 2011),.

¹⁶⁸ Colo. Liquor Retail License Application, COLO. DEPT. OF REV., May 7, 2009 (Feb 12, 2015).

¹⁶⁹ *Id.*

¹⁷⁰ Marijuana Business Fee Schedule, COLO. DEPT. OF REV. (Feb 10, 2015), <https://www.colorado.gov/pacific/sites/default/files/MED%20Fee%20Schedule%20effective%2007012014%20-%2007072014%20version%20with%20occ%20lic%20added.pdf>.

for all other recreational retail marijuana businesses.¹⁷¹ The initial license fee ranges from \$2,200 for testing facilities and products manufacturers, to \$8,000 for cultivators with large plant counts.¹⁷² The renewal fees are the same as the initial license fees, plus \$300.¹⁷³ Various other administrative fees apply to situations like transferring a license, and other similar business-related changes.¹⁷⁴

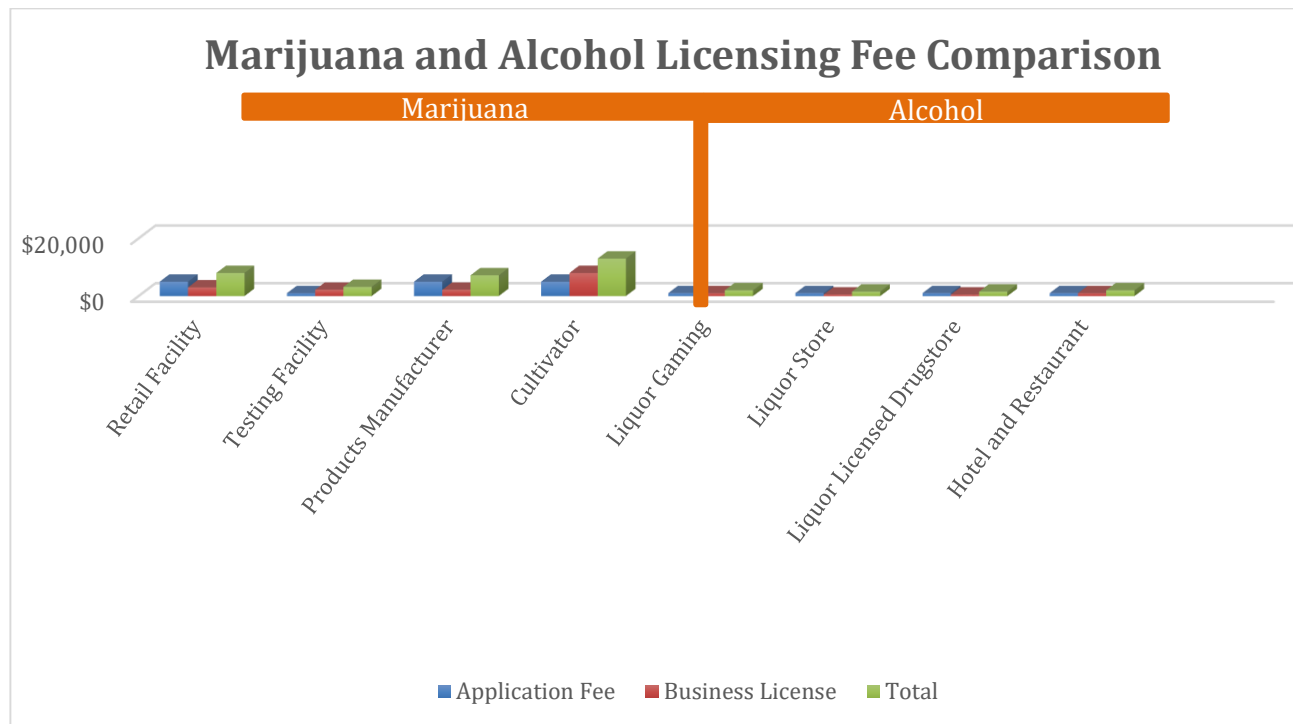


Fig. 3. Marijuana and alcohol licensing fee comparison.¹⁷⁵

These fees seem immediately disproportionate (see fig. 3), as well as the requirements for not only owning a retail marijuana business, but working for a marijuana business when compared to the liquor industry. While fees were not a part of the regulations mentioned specifically in Amendment 64,¹⁷⁶ the intent to create a legitimate industry¹⁷⁷ could be said to support

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Figures used are based on the most expensive scenario, and vary primarily on the amount of plants a marijuana cultivator grows, and the location of a liquor establishment (city, county, or just county).

¹⁷⁶ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of*

the establishment of a regulatory agency overseeing recreational marijuana in Colorado, and this new operation may be more expensive to operate in its infancy than what it costs to run the long-established Liquor Enforcement Division. Ultimately, it is not expected that the cost to run the MED will increase, though the revenue generated by the MED regulations and taxes far exceeds what is needed to regulate the industry.¹⁷⁸

Such a high fee for cultivators truly disadvantages small, micro-growers. If applied to the liquor industry, these fees would pit entities like Coors against small microbrewers. If the liquor industry were regulated similar to marijuana, Colorado's Beer Fest¹⁷⁹ would not exist, because starting a new business would be too risky for most small business owners.

In fact, allowing greater access to the industry will further legitimize it by making it accessible to more people, and eliminating the need for black-market participation. The quality businesses will survive, but the financially advantaged are the only people with a chance to even participate at this point. The inequitable marijuana rules might encourage investors to stay away from marijuana, and instead invest in a liquor business, or even worse, encourage black-market participation.

Another difference in the regulation of alcohol and marijuana is the apportionment of the licensing fees. The Colorado Liquor Code states that license fees and excise taxes collected are dispersed with 85% to the Old Age Pension Fund, and the remaining 15% to the General Fund.¹⁸⁰ Licensing fees collected for recreational marijuana businesses, however, are allocated 50% to the Marijuana Cash Fund, and the other 50% to the locality where the marijuana business is to be established.¹⁸¹ The marijuana retail excise tax is treated more like the alcohol excise tax, with 85% allocated to the Old Age Pension Fund, and the remaining 15% apportioned by county.¹⁸²

One way Amendment 64 protects against excessive regulation is specified in Section 16(5)(a), which states regulations created to support the

Marijuana, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

¹⁷⁷ *Id.*, at § 16(b)(IV).

¹⁷⁸ Viktor Bojilov, *Colorado General Assembly Joint Budget Committee: FY 2014-15 Staff Budget Briefing*, 62-73, COLORADO DEPARTMENT OF REVENUE, 18 Dec 2013.

¹⁷⁹ 2014 Brewer Lineup, ALL COLORADO BEER FESTIVAL (Feb. 26, 2014), <http://www.allcoloradobeerfestival.com/2014-acbf-brewers/>.

¹⁸⁰ Colorado Liquor Code, art. 74, 12 C.R.S., Oct. 1, 2014 (Feb 27, 2015), at 12-47-502, fees and taxes - allocation.

¹⁸¹ Colo. H.B. 1317, 69th General Assembly (2013), at 12-43.3-502, fees - allocation; 12-43.4-104, applicability - retail marijuana.

¹⁸² 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015).

passage of the amendment may not be unreasonably impracticable, and includes licensing fees in what it refers to as regulations.¹⁸³ ‘Unreasonably impracticable’ is defined in Amendment 64 as measures necessary to comply with the regulations requiring such a high investment of risk, money, time, or any other resource asset that the operation of a marijuana establishment is not worthy of being carried out in a practice by a reasonably prudent business person.¹⁸⁴

A \$10,000 application fee for a small grower is certainly a high risk when compared to the risk involved for a large-scale cultivator. The current regulation prevents variety, and inhibits existence of a connoisseur culture similar to those associated with microbrew beer or small wineries. The entrance fees for marijuana businesses severely limits market participation in a way which the alcohol industry is not burdened.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Regulation	Alcohol	Marijuana
Seed to Sale Tracking	No alcohol ingredient tracking	Yes
Testing Products	No	Yes
Government Issued IDs	No	Yes
Periodicals	No age restrictions	Yes
Exiting Packaging	No	Yes
Prohibited Licensees	No class restrictions	Yes-law enforcement prohibited
Residency Requirement	No	Yes-employees and owners
Out-of-State Customers	No	Yes- limited to ¼ ounce per purchase
Fees and Taxes	Disproportionate	Disproportionate

Fig. 4. Colorado alcohol and marijuana regulations comparison chart.

V. Recommendations

While the inconsistencies in Colorado's recreational marijuana laws presented here are not all-encompassing, they stood out most by comparison to other regulations. In response to the issues presented above, the following suggestions are offered to any state considering legalizing recreational marijuana, and regulating it like alcohol:

- 1.) Create provisions to protect taxpayers from excessive taxation by giving taxpayers greater control over revenue and spending of the taxes associated with legalized recreational marijuana. Colorado is unique in that its Taxpayer Bill of Rights offers protection unlike any other state. This protection will help prevent corruption and abuse of a highly lucrative industry by state and local governments.¹⁸⁵

¹⁸⁵ As a fourth generation Colorado native, this writer believes the state's conservative

- 2.) Specify that the revenue generated from any marijuana tax should not fund government expansion, and all marijuana tax surpluses will be refunded to the taxpayers, or disposed in such a way approved by voters.
- 3.) Based on the laws of the state seeking to legalize recreational marijuana, consider the current tax system to make necessary accommodations to protect from over-taxation and uncontrolled spending of marijuana tax revenue.
- 4.) Create voter-control over decisions that will and can be used to exploit the industry's lucrative nature.
- 5.) Require absolute transparency in any regulatory powers created by the legalization of recreational marijuana. When in question, default power should reside with the voters, especially with regard to new or changing tax uses to lessen or prevent government corruption.¹⁸⁶

VIII. Conclusion

Colorado voters approved legalized recreational marijuana under the premise that it would be regulated like alcohol,¹⁸⁷ however, the regulations developed by the state's lawmakers have departed from this intent in a number of ways. How these matters will turn out if ever challenged is unknown, since it is too early to know what challenges may arise from the inconsistencies in regulating alcohol and marijuana in Colorado.

For states considering legalizing recreational marijuana, many factors should be considered and proper precautions taken. Colorado has very unique laws that protect its taxpayers in ways no other state currently

government results from a culture of independent, hardy, survivalists who found government interjection in day-to-day life restrictive to their survival. Some call it a Wild West mentality, but this writer feels there is greater control than is implied by the word wild. Without an established government in many areas while settling the land, persons were responsible for their own survival and from that necessary self-reliability resulted a heightened level of personal accountability. This mentality is quite common among generations of Anglo-Americans in mid-western states settled during the Manifest Destiny movement westward.

This writer also acknowledges that not all states are equal in their protection, and emphasizes this is a vital consideration to legalizing marijuana, or changing any laws capable of great social change. Colorado's entire system of laws may provide protection not available in all states, and vice versa.

¹⁸⁶ This writer believes that states with long histories of corruption should take particular caution. For example, a state like Massachusetts would experience critical problems if they suddenly changed their tax system to one like Colorado's TABOR. Such a drastic change in government operation would be like falling from the 20th floor of a building instead of taking the stairs. This writer recommends against freefall government change.

¹⁸⁷ 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015); Yes on 64: Campaign to Regulate Marijuana like Alcohol, <http://www.regulatemarijuana.org/regulationworks>.

does.¹⁸⁸ To prevent creating a marijuana tax monster, the state's tax laws must be considered and properly addressed in any attempt to legalize recreational marijuana, and precautions taken to maintain proper consistency between the law that legalized recreational marijuana in Colorado, and the regulations applied to that law.

This paper examined Colorado's recreational marijuana laws, specifically the regulations and tax scheme the state's general assembly has enacted subsequent to legalization. When held to the light of the proposed purpose of Amendment 64, certain regulations directly contradict the law's purpose by lacking proper similarity to alcohol regulation in Colorado. Those contradictory regulations include the seed-to-sale tracking system; DOR oversight of testing of products for adulterants and toxins; government issued IDs for retail owners, managers, and employees; requiring periodical literature containing marijuana content be sold from behind the counter in non-age restricted establishments; special packaging to exit a retail marijuana store with marijuana; limiting ownership or interest in marijuana businesses to those not involved in law enforcement; effects of one's residency on their ability to purchase and participate in the marijuana industry in Colorado; and differences in tax and licensing fees.

It is recommended that other states seeking to legalize marijuana examine their own laws carefully prior to following Colorado's path. There is certain likelihood that the amount of money involved in the recreational marijuana industry may tempt some lawmakers to over-tax, and in the worst case, lead to corruption. These problems are better prevented than resolved after the harm is done, and while Colorado's laws are unique, tremendous preventative value exists in understanding why and how the state's laws operate as a whole before designing marijuana legalization laws in other states.

¹⁸⁸ *Colorado's TABOR*, *supra* note 82.

Note the way the odd page header differs from the even; note also that there's no header on the first page. That's a pretty normal layout for published works.